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No. 358

In the Supreme Court of the United States

October Term, 1948.

HARRY (BUCK) OWENS, *Petitioner*,

vs.

THE CURTISS CANDY COMPANY, a Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. ———.

To the Honorable Supreme Court of the United States:

Your petitioner respectfully says:

A.

Summary and Short Statement of the Matter Involved.

(Figures in parentheses refer to pages of record.)

1. The action below was for damages for breach of contract. The contract was entered into by respondent through the manager of an advertising agency named Tuteur, who

was its agent in respect to all the transactions in controversy in the action below (463).

2. The petitioner, a radio broadcaster, made an offer in writing to respondent to accept employment to broadcast over a radio network for 2 years at $500.00 per week, contributing a 13-week test program to obtain a network contract. The proposal was made in two letters dated February 15 (105), and February 23 (111), 1940, mailed at Chicago. Said proposal was orally accepted by respondent in Chicago on June 25, 1940, over the telephone (178), and in writing, mailed at Chicago, on June 26, 1940 (178-180). The district court so found (428-429) and submitted the case to a jury on the basis that it had been established, as a matter of law, that there was a binding two-year contract of employment at $500 per week (468).

3. The action was brought in the Missouri state court on February 16, 1942 (1-4), and the transcript on removal to the United States court, at respondent's instance, was filed on April 4, 1942 (1). The ground of removal was diversity of citizenship and amount involved (461).

4. Petitioner filed an amended pleading (10-13) on October 22, 1943, in paragraph 4 thereof (11) alleging the terms of the contract and its breach. The case was tried on said amended pleading. On February 14, 1944 (437), respondent filed an answer (435), signed by respondent through its attorneys (437), admitting that it had contracted as alleged in the amended petition (436), and asserting that the contract was oral and not reduced to writing and not in compliance with the statute of frauds, without specifying whether it was the statute of frauds of Missouri or Illinois, or both. Said answer alleged no further defenses except denials.

5. On August 2, 1945, the district court filed a memorandum opinion denying sundry motions (432), including one each for judgment on pleadings and such undisputed evidence as was presented at the several hearings, and entered an order overruling petitioner's motion for summary judgment (434). On August 10, 1945 (432), the district court filed 14 findings of fact (425-432) based on the proposal correspondence between the parties and acceptance of said proposal. Quoting Bennett's letter on June 26, the court held in its finding 13 (428): "This was a reply to an oral acceptance of plaintiff's proposal." Finding 14 quoted from respondent's letter of acceptance of June 26, 1940, and found: "This was a written acceptance of plaintiff's several proposals" (429). The memorandum opinion found that defendant accepted the proposal of plaintiff and agreed that beginning in September, 1940, and continuing for a period of two years or 104 weeks, the broadcasts of plaintiff would be accepted, and that a stipulated compensation would be paid to plaintiff (433). And also found, following the 13-week test period, a special contract for limited broadcasts by plaintiff was made covering the summer period of 1940 (433). Findings 15 to 21 (429-432) referred to efforts by respondent to recede from the acceptance, as shown by quotations from said letters, in one of which on July 22, 1940, respondent stated "it has been found necessary to shelve your program for the time being" (431), and to terminate his services for personal appearances with the contract ending August 3, 1940 (431). Said letter advised petitioner (203): "I am today notifying the various stations to release the time which I had reserved for your program." The only reason given in the memorandum opinion for overruling petitioner's motion for summary judgment was that "the burden is on him to establish

by competent testimony the damages, if any, accruing to him" (434).

6. On October 17, 1945, respondent filed an amended answer to petitioner's said amended pleading and asserted five additional alleged defenses (16-21), among which it pleaded Smith-Hurd's Ann. Stats. Illinois, Sec. 1, Chap. 59 (17) (same being the statute of frauds of Illinois), and alleged that the agreement is governed by the laws of Illinois (17). The Missouri statute of frauds was likewise pleaded by respondent (17-18). Petitioner's reply alleged waiver of the additional defenses (21)

7. Said Illinois statute of frauds did not make verbal agreements void, nor prohibit the making of oral contracts for such services. It merely provides what character of evidence shall be sufficient to establish such contracts when actions are brought to enforce them in the Illinois courts—the object of the law being to prevent false swearing and perjury.

8. The Missouri courts enforce valid oral contracts made in Illinois to which the Illinois statute of frauds may apply in the courts of Illinois without being bound by the procedural provisions of the statutes of frauds of Illinois. The Missouri statute of frauds does not apply to any action based on a valid contract made in Illinois or any other state, even though it, by reason of procedural rules requiring written evidence, cannot be enforced in Illinois. The contract here involved did not specify the law with reference to which it was made, and the Missouri rule is that the law of the state where the contract was accepted, or the last act done to complete it, is the law which controls as to its validity—but not the law which controls as to the admissibility of evidence.

9. When the court denied petitioner's motion for summary judgment on August 10, 1945, the original answer

with its admission was pending therein from the time of filing in February of 1944. The letters referred to in the findings of fact (425-432) establish that the contract was an Illinois contract, but nevertheless the court denied said motion on the sole ground that plaintiff must prove his damages. But, under the law of Missouri, the allegation in said answer with reference to the statute of frauds made it appear that the Missouri statute of frauds was a defense—whereas it was not, as applied to said Illinois contract. And, under the conflict of law rule in Missouri, said court could not, under said pleading, consider the Illinois statute of frauds. And, according to Missouri law, the Illinois statute of frauds was no defense, in a Missouri court, to an Illinois contract held valid in the Illinois courts. Said admission necessitated a summary judgment for petitioner, except as to the amount of damages, under the federal rules, as no defense was stated.

10. The trial before the court and a jury was begun on January 22, 1946. On January 24, 1946, respondent requested a peremptory instruction (419), which was denied; and thereafter, on January 25, 1946 (419), at respondent's instance (420), it was permitted to offer further evidence (438). At which time petitioner offered respondent's abandoned answer in evidence, which offer was accepted (435-437), which answer was admitted by respondent (424) to be the original answer of the Curtiss Candy Company and that it alleges that the agreement between the parties was oral and would be understood by the jury as an admission that there was an agreement between the parties (424). At the conclusion of the evidence petitioner requested the court to peremptorily instruct the jury to find for petitioner, which request was denied by the court (439) and the case submitted to the jury, which returned a verdict for respond-

ent and against petitioner on January 25, 1946, whereupon judgment was entered in favor of respondent and against petitioner (26-27).

11. Motion for summary judgment notwithstanding the verdict, and in the alternative for a new trial, was filed in due time on February 4, 1946 (27-32). Said motion was overruled on June 16, 1947. Notice of appeal was timely filed, and mailed to counsel for respondent. The cause was submitted to the Court of Appeals on May 4, 1948 (458-459), and said court rendered its judgment of affirmance on July 20, 1948 (472). Said judgment was accompanied by an opinion (459-472).

12. As shown by its opinion, said Court of Appeals permitted respondent to attack the judgment of the District Court submitting the case to the jury on the basis that it had been established, as a matter of law, that prior to the meeting of the parties in St. Louis on June 28, 1940, there was a binding two-year contract of employment at $500 per week between the parties (468), by contending that since the suit was on an alleged contract not to be performed within one year petitioner did not make out a case within the statute of frauds, in that he did not show an agreement by respondent to the essential terms of the contract by writing or writings (470). And this notwithstanding petitioner objected to the consideration of said contention because respondent had not taken a cross-appeal (470). The Court of Appeals, in sustaining the contention, found that there was no proof of a written contract actionable under the statute of frauds of Illinois or Missouri, and found that the judgment dismissing the case was the only judgment which could rightly be entered on the evidence (472). Whereas, the judgment was not a dismissal but a judgment on the verdict (27).

13. Though the Court of Appeals found that the terms of the contract for two years' employment were stated in writing in petitioner's letter to respondent dated February 23, 1940 (470), it yet ignored the fact that the letter of acceptance (178-180), and many letters by both parties, were all signed by one party or by the other, and applied the rule which applies only in cases where there are signed and unsigned papers involved, while herein all the letters were signed. The Court of Appeals declared that before petitioner could recover, the letter of acceptance should show, by specific reference in clear and distinct terms, that it referred to said proposal of petitioner. Whereas, the Missouri rule is that if some only of the writings be signed, such reference must specifically be made therein to those not signed. Petitioner's proposal was signed. So that it was unnecessary, under the rule, for any specific reference to it to be made in the acceptance thereof. And in Missouri, reference to the proposal need not be made when, by inspection and comparison, both letters appear severally to relate to and form part of the same transaction. It is also the rule in Missouri that a memorandum to satisfy the statute of frauds, which in itself is not sufficient, may be established by following the old practice to put in evidence several papers, as letters, etc., relating to the same contract and, by their reference to and connection with each other, to prove it.

14. The English statute of frauds, adopted in Missouri, adopted the construction placed thereon in the year 1801 by the English courts, according to which construction an admission in an answer that the contract was oral could not be withdrawn by an amended pleading. The same rule is in force in Missouri, and said admission offered in evidence (436) necessitated the giving of peti-

tioner's peremptory instruction to find the issues for petitioner, under the law of Missouri.

Opinion of the Court Below.

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 169 Fed. (2d) 179, and at pages 459 to 472, inclusive, of the record.

B.

Jurisdiction.

1. The date of the judgment to be reviewed is July 20, 1948.

2. The statutory provisions believed to sustain the jurisdiction of this Court are the following: Title 28 United States Code, Section 2101, Clause (c), providing:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days."

(which said statute in its present form was approved June 25, 1948, effective September 1, 1948).

Also Section 347, 28 U. S. C. A., providing:

> "* * * in any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a judgment or decree of such lower court that the cause be certified to the Supreme Court for

> determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal"

(which said statute in its present form was adopted February 13, 1925, 43 Stat. 938).

C.

The Questions Presented.

(1) Whether or not the Court of Appeals erred in failing to give effect to the Missouri law according to which an oral contract, valid in Illinois, will be given effect in Missouri, regardless of the provisions of the Illinois statute of frauds.

(2) Whether or not the restriction of the methods by which parties may contract, imposed by the statute of frauds and applied by the English courts before its adoption in Missouri and Illinois and its construction by the courts of said states, limiting the restriction to one statute of frauds, could be enlarged by a Federal Court by holding, as did the Court of Appeals, that said power to contract is now restricted by two statutes of frauds.

(3) Whether or not the Court of Appeals was bound by the rulings of the Supreme Court of Missouri that the Missouri statute of frauds was no defense to an Illinois contract.

(4) Whether or not the Court of Appeals erred in failing to follow the law of Missouri illustrated in the ruling stated in *Houghtaling* v. *Ball & Chapin*, 20 Mo. 563, l. c. 566, wherein the Supreme Court of Missouri held that the provisions in the Illinois statute of frauds "That no action shall be brought" and no contract "shall be held to

be good" would not govern a Missouri court when its jurisdiction was invoked to enforce a valid Illinois contract.

(5) Whether or not the Court of Appeals was bound by the holding of the appellate courts of Illinois, illustracted in *Michels* v. *West,* 109 Ill. App. 418, that the statute of frauds of that state, pleaded by respondent, did not make the contract herein involved void but merely prescribed the character of evidence sufficient to enforce said contract in the Illinois courts.

(6) Whether or not the Court of Appeals erred in failing to hold that the parties had made an oral contract in Illinois, and that it was enforceable in the Missouri courts.

(7) Whether the Court of Appeals erred in failing to hold that by its letter of acceptance of June 26, 1940, either alone or supplemented by other writings, respondent had accepted the written proposal made by petitioner in his letters of February 15 and 23, 1940, mailed to respondent at Chicago.

(8) Whether or not the Court of Appeals erred in failing to give effect to the admission offered in evidence by petitioner, contained in the abandoned answer of respondent, wherein it admitted that it made an oral contract, as alleged in the amended petition.

(9) Whether or not the Court of Appeals erred in failing to hold that the abandoned answer, in and of itself, signed by respondent through its counsel herein, constituted some note or memorandum of the contract.

(10) Whether or not the Court of Appeals erred in permitting respondent, without a cross-appeal, to attack the judgment of the court below submitting the case on the ground that the parties had entered into a contract, so as to enlarge its own rights under it, and to lessen those of petitioner by asserting that there was no contract.

(11) Whether or not the Court of Appeals erred in holding that the letter by Mr. Bennett of June 23, 1940, transmitting time costs, which constituted Plan "A" (368) of the radio stations, with which respondent made reservations under Plan "B" (368), was a proposal by petitioner withdrawing the proposal made in his February, 1940, letters (105, 111).

(12) Whether or not the Court of Appeals erred in holding that said representations were made with reference to past or existing facts, in view of its own letter of acceptance (178) and of the facts showing that said statement as to radio costs referred to a future time and not an existing or past time.

(13) Whether or not the Court of Appeals erred in holding that the District Court did not err in submitting the question of mutual mistake to the jury.

(14) Whether or not the Court of Appeals erred in holding that the District Court properly submitted the question of mutual abandonment to the jury.

(15) Whether or not the Court of Appeals erred in affirming the act of the District Court in submitting the questions of fraudulent misrepresentations, and also innocent representations, to the jury.

(16) Whether or not the Court of Appeals erred in affirming the act of the District Court in giving effect to respondent's contention that no contract had been made, notwithstanding the finding of the trial court that there was a contract, both oral (428) and in writing (429), and so submitted the case to the jury on the theory that there was a valid contract, and affirming the judgment on said ground, notwithstanding respondent did not cross-appeal.

(17) Whether or not the Court of Appeals erred in denying to petitioner the equal protection of the laws, and thereby discriminating against him, contrary to the pro-

visions of Section 1 of the XIVth Amendment, in view of the fact that the Federal Court, in a diversity case, is merely another state court.

(18) Whether or not the Court of Appeals erred in overruling petitioner's motion for summary judgment.

(19) Whether or not the Court of Appeals erred in failing to hold that respondent, by admitting the contract in its original answer, waived the additional alleged defenses set forth in its amended answer.

(20) Whether or not the Court of Appeals erred in failing to hold that the District Court should have given petitioner's requested peremptory instruction at the close of the evidence to find the issues for petitioner.

(21) Whether the Court of Appeals erred in failing to hold that the District Court should have sustained, and that it erred in overruling, petitioner's motion for judgment notwithstanding the verdict.

(22) Whether or not the Court of Appeals erred in failing to hold that the District Court erred, after denying said motion for judgment notwithstanding the verdict, in refusing to grant a new trial.

(23) Whether the Court of Appeals erred in deciding in conflict with the law of Missouri that the Illinois procedural statute pleaded (17), and which merely provided what evidence should be sufficient to establish a contract in an Illinois court (*Michels* v. *West*, 109 Ill. App. 418), is in conflict with the decision of the Court of Appeals for the Third Circuit in *Continental Collieries Co., Inc.* v. *Shober*, 130 Fed. (2d) 631, wherein that court decided that since the Ohio statute of frauds (in which state the contract there involved was made) did not affect the validity of the contract there sued on, and for said reason the Federal Court sitting in Pennsylvania need concern itself only with the applicable local law and ignore the statute

of frauds where the contract was made, in deciding the question, and that since the local law did not prevent the enforcement of the valid contract made in Ohio by the Federal Court sitting in Pennsylvania that said contract must be enforced by said Federal Court.

Reasons Relied on for Allowance of Writ.

(1) The Missouri statute of frauds pleaded by respondent (17-18) was no defense to the suit for breach of the Illinois contract involved, whereas the United States Court of Appeals decided that the Missouri statute prevented recovery.

Houghtaling v. *Ball & Chapin,* 19 Mo. 84, 20 Mo. 563.
Golson v. *Ebert,* 52 Mo. 260.
Commission Co. v. *Kilbourne,* 111 Mo. App. 542.

(2) Failure to follow the law of Missouri which prevented the Court of Appeals from applying its statutes of frauds to the Illinois contract involved was a failure to follow the law declared by this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64; *Guaranty Trust Co.* v. *York,* 326 U. S. 99-119; *Klaxon Company* v. *Stentor Electric Manufacturing Company, Inc.,* 313 U. S. 487, and *Griffin* v. *McCoach,* 313 U. S. 498.

(3) The contract was accepted in Illinois, and so was an Illinois contract, according to the law of Missouri—and as the acceptance was both oral and written, it was valid under the Illinois law, whether oral or written or both (*Michels* v. *West,* 109 Ill. App. 418). For a valid contract of employment, not to be performed within one year from its date, is not void because not in writing under the Illinois statute of frauds pleaded by respondent, nor is such contract prohibited by said statute, which simply

provides what character of evidence shall be sufficient to establish such contract when a suit is brought to enforce it in the Illinois courts. Missouri always enforces valid contracts of other states without regard to their statutes of fraud (*Houghtaling* v. *Ball & Chapin,* 20 Mo. 563, l. c. 566). The decision of the Court of Appeals, holding the contract void under the Illinois statute of frauds in a diversity case in a Federal Court in Missouri, conflicts with the decisions under the foregoing reason (2).

(4) The Court of Appeals' ruling that "Accordingly there was no proof of a written contract actionable under the statute of frauds of Illinois or Missouri and the judgment dismissing the case was the only judgment which could rightly be entered on the evidence" (472) was a decision directly contrary to the law of Missouri, according to which neither statute of frauds was involved in the action for breach of the Illinois contract sued on in the Missouri courts.

(5) The holding of the Court of Appeals that the provision in the Illinois statute of frauds pleaded (17) as to the character of evidence should be sufficient to establish such contract when a suit is brought to enforce it in Illinois is in conflict with the law both of Illinois (*Michels* v. *West,* 109 Ill. App. 418) and Missouri (*Moomeister* v. *Hannibal,* 180 Mo. App. 717, l. c. 724) and therefore in conflict with the decisions in *Erie* v. *Tompkins* and *Guaranty Trust Co.* v. *York, supra.*

(6) The admission in respondent's abandoned answer (436), which remained in the files as part of the record, and which was offered and received in evidence over respondent's objection (420-424), was an admission against interest and conclusive on respondent under the law of Missouri (*Wahl* v. *Cunningham,* 332 Mo. 21, l. c. 39-40; *Ellegood* v. *Freight Lines, Inc.,* 236 Mo. App. 971, l. c. 980-

981). So that there was no basis in the record for the decision of the Court of Appeals that there was no contract, and its failure to so hold conflicts with the decisions in *Erie R. Co.* v. *Tompkins* and *Guaranty Trust Co.* v. *York, supra;* and any conflict between the procedural laws of Illinois and Missouri should have been resolved against the laws of Illinois and in favor of the laws of Missouri (*Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487; *Griffin* v. *McCoach*, 313 U. S. 498; *Continental Collieries, Inc.*, v. *Shober*, 130 Fed. (2d) 631).

(7) The Court of Appeals, in giving effect to the procedural provision of the Illinois statute of frauds pleaded (17) with reference to the employment contract involved, was in conflict with the law of Missouri, and therefore in conflict with the aforesaid decisions of this Court; and also in conflict with the decision of the Court of Appeals for the Third Circuit in *Continental Collieries, Inc.* v. *Shober*, 130 Fed. (2d) 631.

(8) The decision of the Court of Appeals that, in order to charge Curtiss for breach of the two-year contract of employment entered into by Owens, and written acceptance thereof by or for Curtiss, "it was necessary for Owens to show that the paper Curtiss signed in clear and distinct terms referred to a proposal by Owens of such contract which Curtiss did not sign itself or by its agent" (471-472), was in direct conflict with the Missouri law as applied to the facts in this case, because the alleged law stated by the Court of Appeals is applicable only to cases where there are signed and unsigned papers. Whereas, herein, all the papers offered in evidence were signd by either one party or the other. The Missouri rule is that if some only of the writings be signed, reference must specifically be made to those not signed. But if each of the writings be so signed, such reference to the other need not

be made, if, by inspection and comparison, it appears that they relate to and form part of the transaction (*Peycke Bros.* v. *Ahrens,* 98 Mo. App. 456, l. c. 459; *Boeckkeler* v. *McGowan,* 12 Mo. App. 507). Also, in Missouri, a memorandum insufficient of itself to satisfy the statute of frauds may be supplemented by reference to letters written by the parties with reference to the transaction, and by their reference to and connection with each other, to establish all the requisites of a proper memorandum under the statute (*Heideman* v. *Wolfstein,* 12 Mo. App. 366; *Peycke Bros.* v. *Ahrens,* 98 Mo. App. 456; *Edwards* v. *Watson,* 258 Mo. 631, l. c. 643-644). The failure to apply that rule by the Court of Appeals was also a failure to comply with the decisions in *Erie R. Co.* v. *Tompkins,* and *Guaranty Trust Co.* v. *York, supra.*

(9) The admission in the answer (436), not having been explained or contradicted, was binding on respondent (*Ellegood* v. *Freight Lines, Inc.,* 236 Mo. App. 971, l. c. 980-981), in which case it was held that, because of such admission in another pleading without explanation, there was no issue to submit to the jury, and a judgment based on the jury's verdict was reversed. Failure to apply the Missouri law thus stated conflicts with the opinions in *Erie R. Co.* v. *Tompkins,* and *Guaranty Trust Co.* v. *York, supra,* and necessitates the issuance of the writ.

(10) The statements as to time and costs thereof in Bennett's letter of June 23, 1940 (plaintiff's Exhibit 11, p. 311), were not treated by respondent in its letter of acceptance of June 26, 1940 (178-180), as statements with reference to present and existing facts, but as statements with reference to time and costs in the future—which letter of acceptance asked petitioner to have Bennett let him know how the station time is arrived at and how he was getting along with the radio station that gave

him the figures in arranging for the program, as well as clearing the time, and that he had a representative of said radio station conferring with him to see what could be worked out, both as to the time we can clear and when we can get the program on the air under the new setup, and pending the time the program starts anew to go ahead with personal appearances at $300.00 per week. While under the Missouri law, a mistake to constitute a defense in an action at law must have been made in relation to the existence or nonexistence of a fact, past or present, material to the contract, and not to some future contingency (*Vorchette* v. *Sappenfield,* 223 Mo. App. 460). And failure to apply said Missouri rule to the conceded facts was contrary to the law as declared in *Erie R. Co.* v. *Tompkins,* and *Guaranty Trust Co.* v. *York, supra.*

(11) The letter of June 23 was not Bennett's nor plaintiff's proposal, as shown by respondent's evidence, wherein it was described by Mr. Tuteur as "Plan A" (368), but was a proposal of the radio station, as shown by respondent's Exhibit 6 (368-372), same being "Plan B", or a second proposal by said radio stations, wherein they said, "It has been necessary for us to work this out on the basis of two half-hour periods per week, rather than on three quarter-hour periods per week as originally planned, due to the fact that there will be no time available for three quarter-hour periods at the same time of the day on Mondays, Wednesdays and Fridays each week, as part of this time has, since our first proposal, been pre-empted by the network advertisers" (368-369). Which circumstance was referred to by Mr. Tuteur in his letter of July 22, 1940 (202), when he said, "when this setup could not be obtained for several reasons, which Bennett is not at all responsible for" (203). And therefore there was no basis in the record for submitting the issue of mutual mistake to the jury, or for affirming the judgment

on said grounds. And as the abandonment theory was based on the supposition of a nonexisting fact—that there was a mutual mistake or fraudulent misrepresentation on the part of plaintiff—the decision of the Court of Appeals approving the submission by the trial court of the nonexisting issues as to whether Curtiss had been induced to contract by misrepresentations of radio time available and costs thereof in the letter of June 23, 1940; and whether upon discovery at the meeting of June 28, 1940, of the radio time available and its actual cost there was a recision of the contract by Curtiss, and acquiescence therein by Owens, so that the contract was mutually rescinded; and whether Owens by his conduct, acts and statements abandoned his contractual right (468), there was an application of law to the facts in conflict with the law of Missouri, and also in conflict with *Erie R. Co.* v. *Tompkins* and *Guaranty Trust Co.* v. *York, supra.* That there was no recision of the contract by the parties on June 28, 1940, is established by the statement of respondent in its letter on July 22, 1940, wherein it admitted in writing that it had accepted the proposals of the radio stations contained in respondent's Exhibit 6 (368-372) by stating, "I am today notifying the various stations to release the time which I had reserved for your program" (203). And also by its counterclaim alleging that though it had discharged petitioner he refused to be discharged and continued to work for respondent (436-437), contrary to *Lagerlof Trading Co.* v. *American Paper Products Co.*, 291 Fed. 947 (C. C. A. 7). Said admission under Missouri law, precluded submission of said issues to the jury or affirmance thereof by the Court of Appeals.

(12) The permission given by the appellate court to respondent to successfully contend that the finding by the District Court of June 25, 1940, that respondent orally ac-

cepted petitioner's proposal (428), and in writing accepted petitioner's proposal (429), were without basis in the record, and to attack the decision of the trial judge submitting the case to the jury on the basis that it had been established, as a matter of law, that prior to the meeting of the parties in St. Louis on June 28, 1940, there was a binding two-year contract of employment at $500 per week (468), was a ruling in conflict with the law as declared by this Court and all the courts of appeals, including the Court of Appeals for the Eighth Circuit, wherein it said:

> "It has long been the general rule of practice *in law cases* in the federal courts that questions decided adversely to the defendant in error (now the appellee) in the course of the trial in the lower court, will not be considered in the appellate court in the absence of a cross-appeal."
>
> (*United States* v. *Ten Cases*, 49 F. (2d) 87).
> See also *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185.

(13) In holding the statutes of fraud of Missouri and Illinois applicable to the contract, the Court of Appeals ignored the rule declared by the Missouri courts that the situs of the contract is the place where the offer is accepted or the last act done (*Overcash* v. *Yellow Transit Co.*, 352 Mo. 993; *Daggett* v. *Steel Co.*, 334 Mo. 207). And, as the letter of acceptance (178) of June 26, 1940, by respondent shows that it was accepted over the telephone in Chicago on June 25, and that a letter of acceptance and confirmation was sent from Chicago on June 26, the contract was an Illinois contract. And the failure of the Court of Appeals to so hold and decide the case accordingly was a failure to follow the rule stated in *Erie*

R. Co. v. *Tompkins* and *Guaranty Trust Co.* v. *York, supra.*

(14) Missouri has incorporated the law declared by this Court in *Scudder* v. *National Bank,* 91 U. S. 406, l. c. 412 (3), into its law (*Illinois Fuel Co.* v. *M. & O. R. Co.,* 319 Mo. 899), as follows, l. c. 923:

> " 'Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performence are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought.' "

And as the Illinois statute of frauds pleaded (17) deals only with the admissibility of evidence (*Michels* v. *West,* 109 Ill. App. 418), then the substantive law of Missouri should have been followed by the Federal Court on said question. And its failure to do so necessitates the issuance of the writ of certiorari.

(15) The finding by the Court of Appeals that "There is no substantial evidence to be found in the whole record that Curtiss or its agent, Tuteur, ever intended to employ Owens for a two-year period" (471) is a finding in conflict with the record and the law of Missouri, according to which parties are assumed to intend contract to be binding (*Brehman Coal Co.* v. *Burton Coal Co.,* 2 Fed. (2d) 526 (Mo.), and in conflict with the law of Illinois (*Taylor* v. *Scott et al.,* 178 Ill. App. 478, holding that respondent's intent should not be considered. And it is a further finding that respondent intended to accept petitioner's services during the 13-week test period, and benefit thereby, as it did, without paying for it, as it admitted

at the trial. Petitioner testified that he got no salary during the test period (418). The Court remarked: "The $414.00 covered expenses." Respondent, through counsel, stated, "We admit it. We didn't pay him" (419).

(16) The Court of Appeals failed to apply the Missouri general rule of construction, which prefers validation of the contract rather than invalidating it.

(17) The rule that evidence must be applied according to the law of the place where the suit is brought (*McNeil* v. *Holbrook*, 12 Pet. 89; *Central Vermont Ry. Co.* v. *White*, 238 U. S. 907) has been recognized in Missouri where it was said by its Supreme Court in *Nolan* v. *R. Co.*, 39 Mo. 114:

> "No principle of law is better settled, however, than the forms of remedies and the modes of proceedings (*including, of course, the rules of evidence*) must be regulated solely and exclusively by the *lex fori*."

which herein is Missouri. In *Tremain* v. *Doytt*, 161 Mo. App. 217, the court said, l. c. 221:

> "Matters respecting the remedy, such as the bringing of suits, rules of procedure governing the trial, *admissibility of evidence*, and Statutes of Limitation, depend upon the law of the place where the suit is brought. (*Scudder* v. *Bank*, 91 U. S. 406, cited in *Thompson* v. *Traders' Ins. Co.*, 169 Mo. l. c. 29, 68 S. W. 889; *Broadhead* v. *Noyes*, 9 Mo. 56; *Dorsey* v. *Hardesty*, 9 Mo. 157; *Carson* v. *Hunter*, 46 Mo. 467.)

In *Prentiss* v. *Illinois Life Ins. Co.*, 225 S. W. 695, l. c. 703, the Supreme Court of Missouri declared:

> "Matters with reference to the admissibility of evidence are determined by the law of this state, where the case was tried, and not by the law of

Illinois, where the contract was made. *Thompson* v. *Traders' Ins. Co.*, 169 Mo., loc. cit. 29, 68 S. W. 889."

(18) The English courts, from which Missouri and Illinois took their statutes of fraud, in the year 1801 decided, in *Spurrier* v. *Fitzgerald*, 6 Ves. Jr. 548, 31 Eng. Reprint 1189, that after a defendant admitted in his answer that he had made the contract sued upon and alleged that it was oral, could not be permitted to set up the statute of frauds—which construction of the English statute was adopted in Missouri with the statute itself. And so respondent herein should not be permitted to accomplish a fraud through the medium of two statutes enacted to prevent frauds.

(19) Petitioner did not offer any oral evidence, nor did respondent, of the language used when the oral contract was made, but merely relied upon the solemn admission made by respondent through its present counsel and by its agent, Tuteur, in writing that it had made such a contract. So that, giving effect to said admission herein will be merely giving effect to a contract, which the record conclusively establishes was not based on fraud or perjury.

(20) The statute of frauds adopted from England by Missouri and Illinois, with the construction placed on it by the English courts, gave effect to the admission in the answer of an oral agreement, and prevented the withdrawal of the admission by amendment (*Spurrier* v. *Fitzgerald*, 31 Eng. Rep. 1189, 6 Ves. Jr. 548). The Missouri legislature, in adopting said statute, adopted said construction (*Knight* v. *Rawlings*, 205 Mo. 412). The admission of an oral contract, with a pleading of the wrong section of the statute, cannot be withdrawn by amendment and pleaded in connection with the right section (*Beebe*

v. *Columbia Axle Co.*, 233 Mo. App. 212, l. c. 220-221). The same rule is applied in Illinois (*Clayton* v. *Lemen*, 233 Ill. 435, l. c. 437). Said rules were binding in the Federal Courts.

(21) The law of Missouri is that stated in Anson on Contracts, side-page 145, with reference to misrepresentations as follows:

> "When, therefore, the validity of a contract is called in question, or the liabilities of the parties said to be affected by reason of representations made at the time of entering into the contract, the effect of such representations may be said to depend on the answer that can be given to three questions—1. Were the statements in question a part of the terms of the contract? 2. If not, were they made fraudulently? 3. If neither of these, was the contract, in respect of which they were made, one of those which we will call for convenience contracts *uberrimae fidei*? If all these questions are answered in the negative, the representation goes for nothing."

All of said questions are answered in the negative by the record herein.

(22) The decision of the Court of Appeals is in conflict with the opinion in *Atlas Trading Co.* v. *S. H. Grossman, Inc.*, 169 Fed. (2d) 240 (C. C. A. 3), holding that a Federal Court sitting in New Jersey must apply the law of the State of New Jersey, including its rules on the conflict of laws.

(23) The Supreme Court of Missouri recognized that the statute of frauds was adopted in England because of the low morals of the people of England at the time it was adopted, and pointed out that when it was adopted in 1815 in Missouri it was unnecessary because its inhabitants were not so afflicted (*Bean et al.* v. *Valle*, 2 Mo.

103, l. c. 138-139), and restricted its application for said reason. Whereas the Court of Appeals in this instance not only applied the statute of frauds and perjuries of one state, but applied that of two states, neither of which was applicable to prevent a recovery by petitioner. Which extension of two statutes of frauds either in this country or the British Empire is without precedent, and of itself presents a question of the utmost public importance calling for the application of the rule published in *Magnum* v. *Coty*, 262 U. S. 159, which it is in the public interest to have decided by the court of last resort.

(24) Under the construction given to the statute giving this Court jurisdiction on certiorari to review decisions of the courts of appeals, as stated by Justice Brewer in *Forsyth* v. *Hammond*, 166 U. S. 506, to-wit:

> "Nine separate appellate tribunals might by their difference of opinion, unless held in check by the reviewing power of this Court, create an unfortunate confusion in respect to the rules of federal decision."

The writ should be issued.

And as stated by Chief Justice Taft in *Magnum* v. *Coty*, 262 U. S. 159:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes, first to secure uniformity of decisions between those courts in the nine circuits, and second to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

The writ should be issued.

And as stated in Rule 38 of this Court, this is a case peculiarly calling for the exercise of the discretion vested in this Court by the statute to issue the writ prayed for.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this Court directed to the United States Court of Appeals for the Eighth Judicial Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the Eighth Circuit and of the case numbered and entitled on its docket No. 13672 Civil, Harry (Buck) Owens, Appellant, v. The Curtiss Candy Company, a Corporation, Appellee, to the end that cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated October 14, 1948, at Kansas City, Missouri.

HARRY (BUCK) OWENS,
Petitioner,
By LOIS FINLEY SETTLE,
M. A. O'DONNELL,
MARTIN J. O'DONNELL,
Attorneys for Petitioner.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 358

HARRY (BUCK) OWENS, *Petitioner*

vs.

THE CURTISS CANDY COMPANY, A CORPORATION, *Respondent*

BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1948

No. 358

HARRY (BUCK) OWENS, *Petitioner*

vs.

THE CURTISS CANDY COMPANY, A CORPORATION, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent respectfully submits that the petition for writ of certiorari should in the exercise of sound judicial discretion be denied. In support of its position, Respondent states as follows:

A.

SHORT STATEMENT OF THE MATTER INVOLVED

In the belief that the statement of petitioner does not adequately and concisely present to this Court the facts and issues involved in this cause, we submit our statement of the issues.

The action below involves a suit for damages for breach of an alleged contract for the performance of services as

a radio entertainer for a term of two years. (R. 10-13). The action was originally brought in the State Court of Missouri and was removed to the District Court at Respondent's instance on the ground of diversity of citizenship. Prior to the trial of the cause, Respondent submitted its motion for summary judgment on the ground that no material question of fact was controverted. It was argued that as a matter of law, based upon the facts, the Respondent was entitled to judgment. The specific ground urged was that under the Statute of Frauds of either Missouri or of Illinois, whichever was applicable[1] the alleged contract was unenforceable for lack of a legally sufficient memorandum in writing. This issue was likewise raised by the pleadings and by motion made at trial for a directed verdict, which was denied. The Petitioner filed a cross-motion for summary judgment upon the basis of admissions alleged to have been made by the Respondent and claimed to furnish a basis for a judgment for the Petitioner. The trial court denied both motions on the ground that there appeared to be a controverted question of fact of substantial importance to the disposition of the cause (R. 432) which should be heard upon a trial of the cause.

Thereafter the cause went to trial before a jury upon the issues of the existence of the contract, and the defenses of mutual rescission of the contract, abandonment, and waiver.

The jury found for the Respondent on these issues of fact and a judgment was entered accordingly.

The Petitioner thereupon appealed to the Court of Appeals for the Eighth Circuit. The points relied upon

---

(1) Petitioner in his briefs before the Court of Appeals, as well as in his present petition for writ of certiorari apparently concedes that the contract is an Illinois contract and that the Illinois Statute of Frauds is applicable.

for reversal of the judgment of the Court in substance raised issues of the correctness of the charge to the jury upon the issues of rescission, abandonment and waiver. It was also urged that the verdict of the jury was without support in the evidence. (Opinion of Circuit Court R. 461).

Upon Petitioner's theory of the case as presented to the Court of Appeals, no issue was presented which was not fundamentally that of the correctness of the instructions of the trial court upon the issues of the binding effect of certain representations made, of the definition of the law as applied to rescission, abandonment and waiver, and the propriety of the findings of the jury upon specific questions of fact as controlled by issues of law on which there was no basic controversy.

Respondent herein urged in support of the judgment of the District Court that the verdict of the jury was supported by evidence and that no error was committed in the instructions by the trial court.

Respondent also urged the further basis of affirmance, not referred to by Petitioner, that as a matter of law under the pleadings and motions, it was entitled to the judgment actually entered on the ground that the applicable Statute of Frauds had not been satisfied by the requisite memorandum in writing. On this theory, the judgment was correct, entirely apart from any issue arising on the trial of the cause, such as instructions, rulings at the trial and the existence of substantial evidence upon which the verdict was based.

In reply Petitioner argued only that the issue of law so presented by Respondent could not be considered by the Court of Appeals for the reason that no cross-appeal had

been filed, with a brief statement that at any rate the applicable Statute of Frauds was satisfied by the evidence in the record.

The Court of Appeals affirmed upon the ground that there was no error in the instructions upon the issues of rescission, abandonment and waiver, and that the verdict of the jury was supported by the evidence. Its rulings upon these issues are entirely sufficient to support its affirmance of the decision of the District Court.

It further found, as an additional ground, that as a matter of law Respondent was entitled to judgment for the reason that the Statute of Frauds of both Missouri and of Illinois, (both being substantially identical in all material respects) whichever was applicable, had not been satisfied by the requisite memorandum in writing. No issue of conflict of laws was argued upon the appeal, nor, as is apparent from both opinions below, does either decision turn upon considerations involving the determination of the jurisdiction whose law governs the rights of the parties.

It is the Respondent's contention that no issue is presented by the record in this proceeding which is of significance or of public importance. The cause was tried before a jury upon issues of fact and the decision is controlled in substance by the facts. The Court of Appeals found that no error was committed in the instructions and that the verdict was supported by the evidence.

No point was raised by Petitioner in his brief before the Court of Appeals which raises any problem of importance. No issue involving a choice of law was urged upon by the appeal, and the decision is in accordance with the applicable decisions of the State Courts on all questions of State law.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 169 Fed. (2d) 179, and at pages 459 to 472, inclusive, of the record.

B.

THE QUESTIONS PRESENTED

We feel that the enumeration of questions presented (Petition page 9) leaves somewhat uncertain the nature of the propositions urged by Petitioner.

However, we shall consider here briefly these questions:

(1) The eight questions herein discussed by Petitioner
(2) all seem to bear upon the basic issue sought to be
(3) raised, and will be discussed as a unit.

(4) As nearly as we can arrive at the significance of
(5) these questions, it would appear to be the Petitioner's
(6) point that the contract involved was an Illinois con-
(7) tract and as such controlled by the Illinois Statute
(8) of Frauds. He claims that under the decisions of the Courts of Illinois such Statute is procedural in nature and not substantive; that it is merely a rule of evidence.

He then argued that under the State law of Missouri (which would be controlling upon the Federal District Court here) the Illinois Statute of Frauds would have no force, since it is merely procedural in nature; that the oral contract should be enforced in Missouri on the theory that the Illinois Statute of Frauds does not apply because it is procedural and Missouri Statute of Frauds would not apply because the contract was an Illinois contract.

We believe that the contention is without merit and in direct conflict with the clear weight of authority of the decisions of both Illinois and of Missouri.

Specifically, Respondent urges as follows in answer to these questions:

(a) None of the questions herein presented were raised in the Court of Appeals by Petitioner. An examination of his brief specifying the points relied upon for reversal of the judgment discloses that there was not the slightest reference to any question involving the Statute of Frauds. There was no occasion for such issue to be raised, since the ruling of the Court below had been in favor of the Petitioner on this issue.

Respondent in its answer urged the argument of the applicability of the Statute of Frauds as a further ground for the affirmance of the judgment in its favor. Petitioner's sole response to that issue was that in default of the proper cross-appeal the question could not be considered. The questions herein sought to be raised with reference to this issue of law are an afterthought and were not relevant or necessary to the decision in the Court below.

(b) The propositions of law urged by Petitioner are entirely erroneous.

The contract in question is conceded to be an Illinois contract. The Statute of Frauds of the State of Illinois (Ch. 59, Smith-Hurd Ill. Ann. Stat., Sec. 1, 3), has by the unanimous weight of opinion of the decisions of the Illinois courts been held to be substantive in character and not merely procedural. *Miller* v. *Wilson,* 146 Ill. 523; *Oakes* v. *Chicago Fire Brick Co.,* 311 Ill. App. 111.

In the latter case the Court at page 114 states:

"The leading case on the question in this State, *Miller* v. *Wilson,* 146 Ill. 523, enumerates

the doctrine that the Illinois Statute of Frauds is substantive in nature and not remedial."

Also in point is *Murdock* v. *Calgary Colonization Co.*, 193 Ill. App. 295, in which the Court said:

"But whatever may be the law in other States, it is clearly the settled law in this State that the subject matter of a Statute of Frauds comes within the *lex loci contractus* and therefore does not merely pertain to the remedy but affects the legal obligation and the validity of contracts."

It is likewise the settled law of the State of Missouri that the Courts of that State will apply to a contract made in Illinois the substantive law of contract of the State of Illinois. Under this rule, the Missouri courts will follow the Illinois Statute of Frauds as a substantive incident of the validity of the contract. *Houghtaling* v. *Ball*, 19 Mo. 84; *Johnstown* v. *Downey*, 257 S. W. 504, (Mo. App.); *Brockman Commission Co.* v. *Kilbourne*, 111 Mo. App. 542; *Illinois Fuel Co.* v. *M. & O. R. R. Co.*, 319 Mo. 899.

(c) The decision of the court below on the issue of the Statute of Frauds is in accord with the settled law of Missouri. There is no conflict between the decision of the Federal court below and the law as interpreted by the Missouri State courts.

(9) This involves an issue of fact, raising no question of importance.

(10) This raises a question of procedure and practice of the Federal Courts and the decision of the Court of Appeals is in accord with the decision of that Circuit and of the Federal courts generally. *Standard Accident Insurance Co.* v. *Roberts*, 132 Fed. (2d) 794, 796.

These questions all involve issues of fact decided in accordance with settled law and not submitted to the lower court as the basis of appeal. No issue of importance is raised.

This point has obviously no merit.

These questions involve issues of facts, controlled by the facts and involving no question of law of importance.

It is obvious from the mere statement of the question by Petitioner that no conflict of decisions between Circuits is presented by the authorities cited. The decision in *Continental Collieries Co., Inc.* v. *Schober*, 130 Fed. (2d) 631, has no relevancy to any issue in this case.

C.

CONCLUSION

The decision of the Court below is correct. The case presents no conflict between Circuits, or between the State and Federal Courts in their interpretation of the local law applicable. The case depends almost exclusively upon its facts. The only issue of law raised by the present petition is on a point unnecessary to the affirmance of the decisions of the trial court, and of the Court of Appeals. No question of importance is raised and the Petitioner has had full hearing on all issues of fact and of law which govern his rights.

DATED: November 8, 1948, at Chicago, Illinois.

THE CURTISS CANDY COMPANY
Respondent

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